

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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HICKS & WARREN LLC,

Plaintiff,

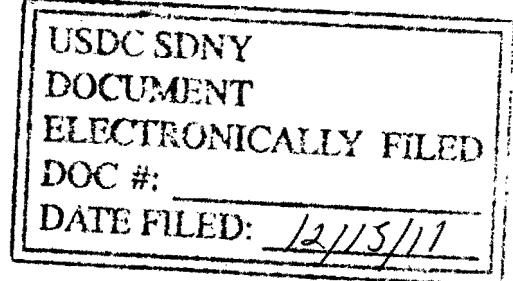
- against -

LIBERTY MUTUAL INSURANCE
COMPANY,

Defendant.

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SHIRA A. SCHEINDLIN, U.S.D.J.:

MEMORANDUM OPINION
AND ORDER
10 Civ. 9457 (SAS)



The parties in this matter have submitted letters regarding the applicability of the attorney-client privilege to a document – Bates Stamp HICKS-000550, referred to by the parties as “Exhibit F” – produced by Hicks & Warren LLC (“H&W”) to Liberty Mutual Insurance Company (“Liberty Mutual”).

According to Edward Henderson, attorney for H&W, Exhibit F is a draft e-mail sent to him by Lester Petracca, a principal of H&W, for confidential review and legal advice. The draft e-mail was a proposed communication from Petracca to Stanley Listokin, another principal of H&W. Legal advice was necessary due to a dispute that was then brewing between Petracca and Listokin. That dispute

eventually resulted in an arbitration by Listokin against H&W.

During a telephone conference on December 9, 2011, I indicated that the precautions taken to protect any privilege that might be applicable to Exhibit F were sufficient to preclude a finding that H&W waived the privilege by inadvertent production. However, I also noted that it was unclear if Exhibit F was privileged, as it did not , on its face, appear to seek legal advice. Accordingly, I directed Henderson to submit a declaration in support of the claim that he regularly reviewed drafts of e-mails that Petracca was planning to send to Listokin with regards to their then-brewing dispute. H&W has now submitted two affidavits detailing this consultation process, one from Henderson, and another from Petracca.

I have now reviewed those affidavits and the exhibits attached to them. Taken together, they show that Petracca sent an e-mail to Listokin that was substantially similar to Exhibit F approximately four hours after he sent Exhibit F to Henderson for review and legal advice. Accordingly, I am now convinced that Petracca did indeed have a practice of sending potential communications with Listokin to Henderson for legal review, and that Exhibit F is one such e-mail. Furthermore, the evidence shows that Exhibit F was sent from Listokin's personal account to Henderson's business account. As there is no evidence that either of

these accounts was accessible by anyone other than the account holder, I am confident that Exhibit F was kept confidential prior to its inadvertent production earlier this year.

Based on the forgoing, I find that Exhibit F is covered by the attorney-client privilege. Liberty Mutual is therefore directed to return or destroy all copies of Exhibit F, and is prohibited from making any further use of Exhibit F in this litigation.

SO ORDERED:



Shira A. Scheindlin
U.S.D.J.

Dated: New York, New York
December 14, 2011

-Appearances-

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